Communal Values in the New Hungarian Fundamental Law: The Habermas-Ratzinger Debate and the Use of the Humanities in Constitutional Interpretation[1]

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1. Two concepts of the constitution

On the general level, this paper is interested in the relationship of individual and communal values, as it is – as well as it should be–- defined in constitutional documents. What it tries to show is that although originally constitutions serve as the foundations of the legal system of a given political community, as a result of the rather strong focus on individual citizens' fundamental rights against the state since the middle of the last century, the communal political aspect of these documents is nowadays pushed into the background. In order to prove this claim and make sense of this development, and also in order to suggest a way to remedy the problem, this paper will deal with the new Hungarian Fundamental Law, which entered into force on 1 January 2012 (Csink et al. (eds.) 2012; Tóth 2012)[2], focusing on its preamble in particular.[3] It will show that the seemingly anachronistic and pathetic paragraphs serve the function of identifying the common cultural heritage of the nation, thus providing the basis for a common communal identity, which was missing or remained hidden in the earlier constitution. In this way it will be interpreted as a return to the earlier function of a constitution.

The question posed in the first part is almost like a chicken-and-egg problem. Is there a genuine need for certain requisites of a community before a constitution can be drawn, the function of which is to create that community?

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2 That the first assessments of the merits and faults of the new Hungarian constitution belong to two, competing sets of interpretations by Hungarian intellectuals is itself perhaps a symptom of the deep cultural-political division line in the country's intellectual life.

3 For an earlier interpretation of the Preamble of the Fundamental Law of Hungary by this author, see Hörcher (2012).

In this part of the paper, some of the basic insights of the Habermas-Ratzinger dialogue (Habermas/Ratzinger 2005) will be cited, where both protagonists tend to answer the question in the same way: indeed, there is a need for a pre-political moral basis if we want a truly effective constitution. Habermas himself refers back in this respect to Böckenförde's memorable formulation (Böckenförde 1991) of this chicken-and-egg problem of constitution drawing. This will be seen as a competing understanding of the role of the constitution in comparison to the most popular recent trend of regarding it as the first and final defence line of individual rights against state intervention.

Following this reconstruction, the paper will interpret some points of the preamble of the new Hungarian constitution in order to show that it makes very good sense if we look at it bearing the conclusions of the Habermas-Ratzinger dialogue in mind. From this perspective, it is an effort to introduce the theme of the need for this pre-political communality in the debate about the new constitution. The Preamble seems to work in a tricky way: it introduces the idea that certain communal values are still relevant in and for the Hungarian political community, in order to create them, and in this way to secure them constitutionally as soon as they are born. It is argued that the Hungarian Fundamental law is to recreate and defend these communal values by reaching out into the historical past, and that instead of the harsh criticism of a pure and formalistic legal approach, a more sympathetic cultural-historical interpretation is required in order to make sense of these efforts. Through these steps the paper arrives at the reconsideration of Böckenförde's second and more tentative thesis that a Constitution keeps many of the remnants of a religious covenant.[4]

2. The chicken-and-egg problem of constitution drawing

The historically conditioned convictions both in the Hungarian and European public awareness, as well as the deep divides within these realms lead us to the first and most basic problem of constitution drawing in modern and post-modern secularised Western societies. I would call this the chicken-and-egg problem of constitution drawing. It consists of two theses, each of

4 If we analyse the title of the preamble of the Hungarian Fundamental Law, called National Avowal, we see the reference to these political theological origins.

which presupposes the other. The first problem (the chicken) is that constitutional founding fathers draw a constitution to legitimize the political regime. The second one (the egg) is this: the first pre-requisite to draw a new constitution is a pre-political, pre-constitutional source of legitimacy and a (cultural moral) order in your community. In other words, in order to have a legitimate regime, and in this way to define your political community, the regime needs to be constitutionally guaranteed; but to give constitutional guarantees to your regime, you need an already existing political community.

This inbuilt contradiction of all constitutional processes is formulated by the German constitutional lawyer, Ernst-Wolfgang Böckenförde. His thesis is the following:

> The liberal, secularised state is nourished by presuppositions that it cannot itself guarantee. On the one hand, it can only survive as a liberal state if the liberty it allows its citizens regulates itself from within on the basis of the moral substance of the individual and the homogeneity of society. On the other hand, it cannot attempt to guarantee those inner regulatory forces by its own efforts… without abandoning its liberalness… (Böckenförde 1991: 45)

What this amounts to is in fact a proposal to look at constitutions in a wider context, and especially from a political, rather than simply from a human rights perspective. For human rights, by their nature, are hardly negotiable. But Böckenförde's thesis shows us that the liberty that constitutions can guarantee does not, or should not, concern only each and every citizen, but the whole political community together from which it derives its own legitimacy.[5] This communal liberty, which is after all the source of the guarantee of individual liberties, is by its very nature, self-controlled and therefore necessarily limits the freedom of the particular citizen in certain cases.

If we want to appreciate the importance of Böckenförde's insight for understanding the European and the Hungarian case, we need to take two further steps. First, we have to look at the development of an exaggerated focus on universal individual rights in recent constitutional developments, and then we have to see that in the Habermas-Ratzinger debate two German thinkers with opposite world-views seem to come close to each other in admitting the truth of Böckenförde's thesis. This surprising concordance suggests, as we shall see, the relevance of the thesis in actual new constitution-drawing processes like in the Hungarian case, and in constitutional the-

5 For a similar account based on different assumptions, see Skinner (1998).

ory as well. It can help correct one of the supposed self-evident theses about modern constitutions: that they are simply meant to defend the individual's rights against the misuses of the overwhelming powers of the modern/post-modern state.

3. Habermas's modus vivendi between enlightened reason and religious belief

In this part of the paper, we look at the Habermas-Ratzinger dialogue on the pre-political moral conditions of the constitution of a free state. It will be shown that there is something more to it than the individual's defence against the state. Let us try to reconstruct the main points of these discussions one by one.

In the published version of the dialogue, we only have two neatly argued essays by the two conversationalists, and cannot see the dynamics of the exchange. It is Habermas who starts the book format with a paper entitled *Vorpolitische Grundlagen des demokratischen Rechtsstaates?*[6]

For the lack of space, we do not reconstruct the whole line of the argument, focusing only on three of its aspects. First, we have to show his standard interpretation of political liberalism. Then we have to see that he steps over this liberal minimum towards what he calls "constitutional patriotism." Finally, he has to make sense of the fact that religion does not seem to disappear in (post)modern Western societies; therefore, there is a need for a *modus vivendi* between enlightened reason and religious belief as well.

Habermas certainly accepts and affirms the liberal minimum as his starting point, a kind of updated Kantian republicanism. Accordingly, political liberalism is more than the individual's safeguards against the state (Habermas/Ratzinger 2005: 22). It guarantees a justification of constitutional democracy, which is independent of the religious and metaphysical traditions of the particular country. The "Rechtsstaat"[7], when established in a democratic manner, provides more for its citizen than simple negative liberty. By what Habermas calls "communicative freedom" it is also able to stimulate its citizens for more political activity (Habermas/Ratzinger 2005: 23).

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6 Circa: The prepolitical basis of the democratic constitutional state.

7 Roughly the German equivalent of the English 'rule of law' ideal (mutatis mutandis).

But as soon as it does more than simply safeguard individual negative liberties, it raises the question of social cohesion, which is characteristically missing from most mainstream accounts of the liberal minimum. This is all the more surprising because the Hobbesian-Lockean concept of the modern state was created as an answer to the chaotic civil war conditions of the period, caused by religious disputes, and the deep schisms of society brought about by theological disputes. The Leviathan is a mechanical monster whose primary aim is to hold individuals together under the umbrella of the state. From another perspective, the problem of legitimacy also very soon surfaced, as this was perhaps the most important argument against absolute rulers. In addition, no legitimacy can be expected without the constitutional arrangement covering the problem of social cohesion as well. Naturally, one can argue that democratic procedures themselves can only solve that problem because they help citizens identify themselves with the neutral state "system", but Habermas is not too optimistic in this regard. He claims that a stronger, unifying bond is required, which needs to be built on such assumptions as the common good (*Gemeinwohl*) and the common interest (*allgemeine Interessen*) (Habermas/Ratzinger 2005: 22, 23).

When we arrive at this point, we cannot stop short of what Habermas calls "constitutional patriotism" (*Verfassungspatriotismus*) (Habermas/Ratzinger 2005: 25). Behind the façade of a constitutional document, we need to find the following, or other such pillars as a common religious background, a common language, or a national consciousness. A constitution is supposed to create the conditions of governability, which cannot be achieved without a minimum level of solidarity and self-sacrifice among the members of the political community. Solidarity cannot be achieved, however, without the basics of social justice. And social justice dwells in the particularities of the historical context, and if you are interested in that, you need to enter the rich and thick texture of cultural value-orientations (*dichteres Geflecht kultureller Wertorientierungen*) (Habermas/Ratzinger 2005: 25). The citizens themselves understand and interpret their own constitution not through its abstract, normative content, but always identifying themselves with its concrete background meaning, as they draw it from the context of their own national and familial history.

It is at this point that Habermas's talk becomes self-critical of his own tradition. Although he himself seemed to be a partisan advocate of enlightened rationality, now he seems to be quite sceptical about the constitutional consequences of modernism. He talks about the option of a derailed modernisation (*entgleisende Modernisierung*), which could easily consume the

accumulated sources of cohesion and solidarity in society, and this would be the more dangerous as with simple legal enforcement this stock of democratic bonds cannot be rebuilt. The centrifugal power results in the sort of depoliticization so often echoed in the polemic texts of the critics of mainstream liberalism usually labelled as communitarian and republican.[8] Here Habermas returns to this internal criticism of liberalism, based on the common sense voters' loss of trust and disenchantment about its "invisible hand", a mistrust that is tuned even louder by the radical scepticism about the efficacy of reason in human matters generally. It is in fact Habermas's worries, which are partly motivated by the postmodern critique of universal truth and abstract justice, and partly by the actual practice of a spread of anti-democratic and fundamentalist ideologies, that seem to bring him close to the universalism of Christianity, and more particularly, to Catholicism. He claims that enlightened philosophical *Vernunft* needs to correct itself by a reconsideration of the hidden potential of religious belief and that of the theological doctrines on which this mental framework is built. In other words, he encourages philosophers not to shy away from learning once again from theology – while he still keeps his secular presumptions and reserves his own trust in Reason true and valid.

Let us see whether Habermas is right in his final assessment of the situation. It is only now that the meaning of the dialogue form becomes clearer, when we realize that Cardinal Ratzinger tries to answer the very worries Habermas voices. Again, we shall be unable to reconstruct the whole of his contribution,[9] but concentrate on the issues Habermas brought to the forefront and Ratzinger answers, and in particular, on Ratzinger's ideas on liberty and law, on the relationship of religion and reason, and finally on his views about the process of secularisation.

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8 I am of course referring here to the writings of MacIntyre, Sandel, Taylor and Walzer on the one hand, and Skinner and Pettit, on the other. These two groups are neither homogeneous in themselves, nor close to each other, representing rather divergent political orientations they provide a loud voice of public criticism of what they regard as individualistic liberalism.

9 Entitled: Was die Welt zusammenhält. Vorpolitische moralische Grundlagen eines freiheitlichen Staates. (What holds the world together? The pre-political moral basis for a free state.).

4. Ratzinger's liberty, reason and religious hope

It is not surprising that for Ratzinger as well as for Habermas, the liberal minimum is the starting point. However, his idea of liberty is from the very start richer than the minimum content of the negative liberty of political liberalism. He relies on an analysis of the concept of the *Rechtsstaat*, which is parallel but not equivalent to the Common law concept of the rule of law in German language jurisprudence, when he claims that liberty without law (*rechtlose Freiheit*) is self-destructive: it evidently leads to anarchy, and through that to the disorder which destroys the safeguards of individual liberty as well (Habermas/Ratzinger 2005: 42).[10]

However, while law supports liberty, law itself is also in need of further support. What could provide the fundament of law in a *Rechtsstaat*? Naturally, as in the natural law tradition, it is morality that lends the edifice of law its firmness. A procedural concept of justice, the majority principle cannot arrange it alone (Habermas/Ratzinger 2005: 43). And is morality itself sound enough? After all, we have seen Habermas's doubts about the pluralistic challenge to morality, and the sceptical concerns about its relevance in a highly complex, individualised society. Certainly, Ratzinger is not so naïve as to suppose that morality is untouched by the spirit of the time. He himself is most concerned about two of the contemporary challenges to our moral firmament. One is terrorism. Once again, let us keep in mind that the talk takes place in the aftermath of September 11 when even progressive intellectuals had to seriously rethink their own strong convictions, in order to find a common ground with their more traditionalist countrymen against the common enemy, and they had to admit that the Greco-Roman Christian morality is robustly universalistic, and therefore its main norms, including the ten commandments are acceptable not only for the moderate versions of other major historical religions, but for atheists as well. The pure fact that the terrorists did have support for their seemingly unacceptable actions even in Western societies shows that there is a strong moral nihilism which targets our most basic moral precepts. On the other hand, and this is the second challenge, scientific inventions and discoveries directly confront us with the question how to reaffirm our moral insights in light of the often disturbing

10 We do not have the space to describe the difference between the concept of the rule of law and the German-language concept of the *Rechtsstaat*. However, one should keep in mind that the latter is already very closely related to the concept of the state, while the former one's validity does not depend on an idea of the state.

results of science not yet available to our forefathers. Ratzinger's primary example is cloning, but the whole spectrum of brain research or artificial intelligence triggers similar ethical worries. The results themselves would require more research into unchartered territories, but our moral convictions make any further steps highly risky, or morally unacceptable.

Before we can reliably assess the dangers and losses caused by the moral framework of Western modernity (a term not characteristic of Ratzinger's own vocabulary), we have to rethink – as Habermas suggested – the relationship of reason and religion.[11] In theology too rational discourse had its high water marks, but in the light of 20th century tragedies, serious questions need to be answered within theology itself.[12] Subjectivism, relativism, particularism, and the postmodernism – all had their share in discouraging a self-confident rational discourse of theology. Yet, the tradition of the rationality of scholasticism and the relevance of the natural law doctrine always resurface in theoretical discussions. In the 20th century the dilemma once again came up whether this rationalistic theology could itself underpin a universal morality, based on natural law and the human rights. Ratzinger seems to be rather cautious as far as these hopes are concerned. He is more open to a frame of mind which investigates the problem of what religion and reason should mean for each other, and the necessity to mutually accept barriers and duties (*eine Lehre von den Menschenpflichten und von den Grenzen des Menschen*) (Habermas/Ratzinger 2005: 51) beside and beyond the legally sanctioned declarations of universal rights and liberties. They surely have their own functions in the life of a thriving Western political community, but religion and reason should not pretend not to know about each other.

After considering the close relationship between liberty and law, reason and religion, Ratzinger arrives at the third point he wants to make. This is a reassessment of the problem of secularisation in our present day discourse. Recent researches into comparative cultural studies, as well as the resurfacing of a discourse of political theology in our Western debates suggest that perhaps the idea that the West can follow a special path, a *Sonderweg,* is itself the manifestation of a Western bias resulting from an overestimation

11 About this theme, see the papal encyclical Fides et Ratio (John Paul II, Pope 1998).

12 See the rational self-criticism of reason and the faithful criticism of faith in the political theology of Johann Baptist Metz (Downey 1999).

of the powers of a central reason in organising our complex societies.[13] It is certainly not surprising that Ratzinger joins the camp of those contemporaries who argue that the historical thesis of a straight progress (or decline) to final disbelief is not a correct description of the modern, and even less of the postmodern condition. To be sure, Ratzinger does not turn into the anti-modernist type of thinker (Habermas/Ratzinger 2005: 53, 55). Rather, he joins the renewed interest in political theology, which is not framed simply in the philosophical paradigm of anti-modernist thinkers, but also in that of the post-Vatican II tradition of theology. The main difference between the theological and the anti-modernist philosophical trends is an optimism or hope, which is present in theological writings as a consequence of their courageous reliance on the teachings of the Bible and of the tradition of the Church. Nevertheless, my point is only to refer to the common element in the thought of Habermas and Ratzinger, the one that enabled them to sit together: that there is perhaps a need for a community's pre-political bond for a constitution to work properly.

5. Thick and thin concepts of a constitution

If the thesis that there is an overlap, or at least a meeting point between their respective discourses is correct, it makes the strong claim of a shift from simply individual human values to communal values in some contemporary constitutional thought as well more viable. In what follows, we rely on this strong claim, and from this perspective have a look at the value choices of the Preamble of the new Hungarian Fundamental Law. More particularly what needs to be explained is why a new constitutional catalogue of the basic communal values of this political community was required. First, the symbolic and historical-cultural values will be analysed, which will be followed by a look at the concept of individual and social responsibility, and finally the social role of religious and moral norms will be taken into account.

In an earlier paper, I argued that the main reason behind the lack of a coherent system of values in the Hungarian constitution created at the national roundtable talks of the transition period (1989-1990) was an effort to achieve a minimum consensus among partners around the table with very

13 About the problems confronting a centralised reason in governing complex societies, see Hayek (1969).

different experiences, aspirations and final *Weltanschauungen* (Hörcher 2009). The main dividing line around the table, of course, was the one that separated the Communists representing the party and its regime and their allies and the as yet unelected opposition. But within the camp of the Communists itself there were remarkable differences of opinion, and due to the abrupt changes in the political situation these differences shifted rather significantly during the process of the negotiations. Certainly much more and much wider differences were to be expected among the different strands of the opposition. This distance and distrust among the parties to the negotiation made it only reasonable not to strive for some sort of a well-defined and detailed construction of political, social and moral priorities in the constitution, which only served to frame the road to the first election, giving the country a freely elected, legitimate parliament and government, and – against the wish of some of the opposition – to lay down the foundations of a legitimate political institutional structure. The difficulties to find a compromise satisfying all the participants excluded ideological negotiations and, therefore, the cautious and fragile agreement emphasized that the only reasonable aim to target was a transitory constitution that would serve only until a final constitution could be worked out by political parties legitimized to take part in a constitutional assembly by free elections.

However, the political reality rearranged this initial schedule. The political power of the first government was so weak that no energies remained to face the challenge of the creation of a final constitution which could unite a society dramatically shattered into pieces after decades of Communist rule.

On the other hand, the constitutional practice of the young democracy was largely predetermined by the ideas and actual policies of the newly established constitutional court, led by its first extremely motivated professor president, László Sólyom. The often rather activist interpretation of the transitory constitution by the judges of the constitutional court has not succeeded in providing historical justice to a community which had been suppressed by totalitarian regimes whose main leaders and culprits very rarely had to face criminal or even political charges before criminal courts, which could have legitimized the new system in the eyes of the general voters. Although in the short run the majority of citizens were more interested in finding their place in the new economic context rather than in the symbolic politics of historical retribution, in the long run the system's value deficit played a major role in delegitimizing the political system. The explicit preference of the Sólyom court for legal security as opposed to historical justice created a

political climate in which reference to commonly shared value contents in the general political discussions in order to heal historical wounds and restore public trust was not a realistic option of political strategies.[14]

If we apply the insights gained from the dialogue between Habermas and Ratzinger, there can be no doubt that sooner or later this discrepancy between the needs of the political transition itself and the risk avoiding policies of two of the most important actors of the new constitutional context, most notably of the first prime minister himself and the first president of the Constitutional Court, had to wreak havoc. As we have seen, a constitution needs to reconnect the neutral institutional framework with the underlying moral-cultural order without which it loses its legitimacy and the motivation of the citizenry to actively support it. In the long run, therefore, it was evident, that a new constitution would eventually be needed to solve the problem, and to let the values of society infiltrate the institutions created by the impersonal mechanism of the law and by the all too cautious lawgiver. Any political analyst who wants to present the decision to draw a new constitution as simply the tyranny of the Orbán government disregards this necessity – even if it is a legitimate criticism that the two-thirds parliamentary majority behind the government did not manage to convince its fragmented and humiliated opposition to take part in the constitution drawing process. Therefore the aim of the constitution is unlikely to be achieved in the short run.

6. History in the constitution and the historical constitution

In what follows, we cannot deal with the whole system of the new constitution. Rather we shall focus on the part of it where the new perspective is introduced into the constitutional edifice: i.e. on the preamble, which bears the very telling title of 'National Avowal'. We claim that it is through the preamble that the text of the constitution tries to connect the neutral state institutions with society's cultural-moral order, in this way making it possible for trust to accumulate towards it. As mentioned, we have already given an overall assessment of the preamble (Hörcher 2012). We shall only focus

14 For a wording of this basic choice by the constitutional court, see the following extract from a court decision: "A mindig részleges és szubjektív igazságosságnál a tárgyi és formális elvekre támaszkodó jogbiztonság előbbrevaló." (As opposed to the always partial and subjective justice, priority should be given to legal security supported by objective and formal principles.) (11/1992).

on those of its elements that provide evidence that it had and still has this legitimating function. We shall take out those building blocks that should be seen as newly introduced symbolic-communal values and cultural-historical references.

One of the remarkable features of the National Avowal is a vocabulary in which not only are different references to culture and history repeatedly used, but which provides an approximation of these terms within the context of the Hungarian constitutional tradition. The nation's history is proudly projected on a canvas of one thousand years, tracing it back to the kingdom of St. Stephen, the founder of the State.[15] The possible criticism of xenophobia can firstly be countered by referring to the parts where the national minorities' language and culture are defended, and secondly by pointing out that national culture is here understood as a "contribution to the diversity of the European Union." Further, the wide historical perspective of the constitution makes it quite natural that the long forgotten tradition of what is called *historical constitution* is also reintroduced here. The move of reawakening this historical phrase is highly debated by critics who allege that this part of the text is anachronistic and suspect a political ulterior motive, which encourages the lawgiver to destroy the current practice of the constitutional court (Radnóti 2012). However, one should seriously consider the following question: was it really necessary that a country like Hungary, with a long-standing constitutional tradition, when regaining its independence in 1990 should try to imitate the quite recent constitutional practice of a foreign country – in our case that of Germany? Why was no thought given in the context of the political transition process to opting to update its own earlier practice – or at least trying to reconcile it with contemporary international standards. I do not find it quite so unquestionable that a country's own constitutional past should be declared dead because of a break in its history. No doubt, the tradition needs to be re-formed before it can be used in actual constitutional legal practice: but if it can play a part in reassuring a nation of its own historical identity, it is worth the price. Therefore, I do not regard it quite so mischievous that the preamble, no doubt at certain points articulating a slightly exaggerated, and occasionally even kitschy pathos, feels entitled to solemnly declare that "We do not recognise the suspension of our historical constitution due to foreign occupations."

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15 "We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago." References to the text of the preamble: (The Fundamental Law of Hungary 2011).

In the same way: Is it truly a form of aggressive nationalism, and therefore an unacceptable discrimination, to claim that the National Avowal is pronounced by the Nation?[16] If it is a historical fact that (1) there was a constitutional tradition which referred to the Hungarian nation and that (2) this nation was endangered in the historical storms of the last century, is it not natural that the document that serves the political revival of the constitutional tradition expresses its wish to get the members of the nation united, provided this aim does not turn the nation against its neighbours? If strong words are pronounced against this intention, they tell more about the non-negotiable position in the liberal credo of a few contemporary critics who regard 'the nation' as a shameful word and less about an acclaimed "nationalistic" ideology, which – no doubt sometimes with exaggerated pathos – tries to help to return the country's self-perception to a state of normality.

If the nation is an unwelcome concept for present day students of constitutional law in the text of a constitution, the defence of marriage is even more unacceptable to many who regard it as discriminating against other intimate relationships. Yet there is nothing unacceptable in the syllogism that if the nation is a constitutional value to be defended, and the nation's survival depends on the traditional institutions of marriage and family, the constitution has a role to safeguard these institutions, even if recent radical political trends in the European context indicate that this is outmoded.[17]

Turning to the references to religion and traditional moral values, it might seem that we try to collect only themes that challenge the contemporary consensus. Although using the name of (the Christian) God is tricky – a quotation from the first line of the official Hungarian Hymn is used as a motto for the whole –, representatives of the secularist ideologies from a wide spectrum of the European political and intellectual elite find it unacceptable that this reference is still there. However, if we take the main theme of the Habermas-Ratzinger debate seriously, we should find nothing surprising in the Fundamental Law's claim that one of the most important safeguards of nationhood is exactly religion: "We recognise the role of Christianity in preserving nationhood." Here we have a clear case that proves that

16 "We, the Members of the Hungarian Nation…" According to Sándor Radnóti, the Fundamental Law "resembles an agitating, homogenizing, activist pledge that excludes those who think differently" (Radnóti 2012: 109).

17 "Hungary shall protect the institution of marriage… shall also protect the insitution of the family, which it recognizes as the basis for survival of the nation." (Fourth Amendment: Article 1.).

present day constitutional sensibilities are to be reconsidered in the light of the debate that convincingly argues that a system of legal regulations cannot work long without the underlying moral-cultural horizon.

Secularists would also sharply criticize the preamble's phrase that "we honour the holy Crown" (Radnóti 2013). This intolerance towards an alternative view is the more incomprehensible because at another point the text explicitly claims, "The State and Churches shall be separate. Churches shall be autonomous. The State shall cooperate with the Churches for community goals." Giving reverence to the Holy Crown is not plain Christian traditionalism, but simply reconnects the present to an earlier constitutional doctrine, where the Holy Crown served as a constitutional guarantee. Historians certainly keep debating the ancient status of the doctrine of the Holy Crown (Péter 2003; Rady 2000), yet it is unquestionable that in one form or another the Holy Crown belongs to the political nation's past, therefore its return in the present document should not surprise anyone – though it certainly needs serious reflections how and in what sense constitutional significance should be attributed to it.

That the new Hungarian Fundamental Law, with its explicit references to values in its preamble belongs to the post 9/11 reawakening of Western political morality and theology, as it emerges in the Habermas-Ratzinger dialogue is further reassured by its constant recall of morality. It cherishes "talent, persistence and moral strength" and rather outspokenly defends the self-evident idea that "after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal."

If we want to historically evaluate this confrontation between the anti-religious secular ideology of contemporary constitutional theory and the often pathetic, sometimes exaggeratedly moralising and sometimes even sentimentally religious overtones of the language of the preamble, we realize that the founding fathers of the new Hungarian Fundamental Law deliberately followed the language use of the elderly Edmund Burke in fierce debate with defenders of the French Revolution. We even find an almost direct reference to Burke when the National Avowal calls attention to something like intergenerational solidarity in a phrase which defines the constitutional document as "a covenant among Hungarians past, present and future; a living

framework which expresses the nation's will and the form in which we want to live."[18]

This connection between the dead, the living and the not-yet-born points to the idea of intergenerational responsibility. The concept of responsibility, explicitly used in the text in the sense of self-reliance, does not simply refer to a kind of personal trustworthiness or reliability in this context. Neither should it be understood as simply referring to political responsibility. In the words of the National Avowal, it is rather "a sense of responsibility for every Hungarian", including "our descendants." Here the Fundamental Law relies on Burke's original idea, who in turn borrows it from ancient wisdom (*mos maiorum*) in the ancient Roman tradition and extrapolates it to future generations. Here, the tradition-dependent view of the Fundamental Law proves to be quite topical, confronting issues that are only too relevant for the contemporary world and its aftermath. The idea of the covenant again refers to the religious background: this norm (or promise), which is naturally of Biblical origin, referred to the alliance between God and the chosen people, a religious and political community itself. The idea is present in the Old Testament and the New Testament alike, thus it belongs to both the Jewish and the Christian heritage. In a way, the invocation in the motto very nicely fits this concept of a nation's covenant, as indeed the poet of the Hymn referred back to the historical tradition of seeing the Hungarian nation in the role of the chosen people, in its ambivalent love-hate relationship to God.

7. Böckenförde's second thesis

We have seen that one of the most important guidelines of the new Hungarian Fundamental Law is an effort to overcome the supposed individualism of the earlier one, and an effort to talk about the individual in her capacity of being part of a larger whole, together with her relations to others. This might be the reason behind its renewed interest in the smaller circles of human communities (marriage and family), and in the larger ones (nation, religion). This is why it does not present the state as the common enemy: it tries to show that in fact the state might be helpful to the individual as well as to her

18 Burke famously talks about "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born" (Clark 2001: 261).

smaller or larger communities. The constitution turns out to be quite helpful in safeguarding individual as well as of communal interests.

There is one more question to be answered. To finish the comparison of a theoretical dialogue between a secularly oriented philosopher and an academic theologian and the connection between them and the actual birth of a new constitutional value-system in Hungary, I will turn back to the original source of Habermas's ideas to answer it, or at least to make sense of it – and this is the constitutional perspective of Ernst-Wolfgang Böckenförde. This author, a former judge at the constitutional court of Germany himself, and one of the most authoritative voices in the constitutional development of the German Federal Republic, presented an almost blasphemous proposition, i.e. to reconsider the isolation between religion and the "neutral" state.[19] What I shall call Böckenförde's second, tentative thesis is the following:

> So we must ask once again – with Hegel – whether the secularised, temporal state must not also, in the final analysis, live by the inner impulses and bonding forces imparted by the religious faith of its citizens – not, of course, in such a way that it is turned back into a 'Christian' state, but in such a way that Christians no longer see that state, in its secularity, as something alien and hostile to their faith but as an opportunity for liberty, to preserve and realise which is their responsibility, too. (Böckenförde 1991: 46)

The implicit question behind Böckenförde's hesitant idea is the following: Is it not the case that perhaps even the much acclaimed liberal neutrality needs the support of religious faith, which it deliberately excludes from its own considerations? (Böckenförde 1991: 46) As the point is made to terminate his essay on the rise of the state without explicit answer, one needs to be cautious interpreting this second thesis. However, it is clear from the whole argument of the article that he focuses his analysis of the challenges of the contemporary Western state on two specific dangers. One is what is called the "Christian" state, where the separation of State and Church has not actually taken place. The other is an exaggerated understanding of secularisation, where it also means something like "de-Christianisation" (Böckenförde 1991: 43). In his view, the Western constitutional state is between these two radical positions. The separation between the temporal and the

19 The concept of neutrality needs to be put into brackets, as obviously the concept of a neutral state is itself an idealisation, and it very clearly bears the marks of a liberal (i.e. ideological) message.

spiritual should be taken seriously.[20] But this should not by definition mean a criticism of religion. On the contrary, the suggestion is if we deepen our historical knowledge of the history of the birth of the European state, we shall obviously recognise that the separation thesis is a natural development from Christian premises, as liberty is a virtue cherished by Christianity itself. However, in order to keep order within its own border, the state needs to look after the safeguards of liberty. If nations cannot live "without a unifying bond antecedent to that of liberty", neither can states do so, as after all, their *raison d'etre* is that of the nation. Neither state, nor nation can long survive, suggests Böckenförde, if it needs to "live by the guaranteed provision of individual liberty alone" (Böckenförde 1991: 44). Böckenförde is quite sceptical of the kind of simple *recourse to 'values'*, that we encounter in the Hungarian political debates, or of the Aristotelian polis tradition, that contemporary scholarly literature advocated in Germany.[21] However, he is also quite clear that the question has to be asked: "On what will the state base itself in time of crisis?" Here, we would not go any further than Böckenförde did, and offer the question without comments for the reader's consideration, and if needed, the further secondary literature below, for the discriminate and responsible reader.

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20 "There is no way back across the threshold of 1789 that does not destroy the state as the order of liberty" (Böckenförde1991: 45).

21 He refers especially to Hennis (1963).

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